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No. 94495-4

IN THE WASHINGTON STATE SUPREME COURT

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In re the Detention of:

DONALD HERRICK,

Petitioner.

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HERRICK'S SUPPLEMENTAL BRIEF

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**I.**  
**ISSUES PRESENTED FOR REVIEW**

1. Is RCW 71.09.050(1), which allows the trial court to order a pre-commitment detainee to submit to a PPG upon a request by the State's evaluator, unconstitutional on its face because it violates the pretrial detainee's state and federal constitutional rights to privacy and due process of law?
2. In the alternative, is RCW 71.09.050(1) unconstitutional as applied to Herrick under the specific facts of this case?

**II.**  
**STATEMENT OF THE CASE**

In November 2010, the State filed a petition seeking to commit Donald Herrick as a sexually violent predator pursuant to RCW 71.09. Herrick stipulated to probable cause and has been housed at the Special Commitment Center ever since. The petition alleged that in 1997 Herrick was convicted of first-degree rape. In February and June 2010 he had committed new "overt" acts of stalking. And, finally, the petition alleged that Herrick suffered from a mental abnormality: Paraphilia not otherwise specified and anti-social personality disorder. Herrick stipulated to probable cause. CP 661-663.

Prior to filing the petition, the State's expert, psychologist Dr. Brian Judd, completed a clinical evaluation record review. In an

evaluation dated October 9, 2010, Dr. Judd opined that Herrick met the diagnostic criteria for paraphilia not otherwise specified (NOS), alcohol abuse, cannabis abuse, voyeurism (provisional), and antisocial personality otherwise specific (NOS). Of these disorders, Dr. Judd determined that paraphilia NOS met the criteria for a mental abnormality as defined in RCW 71.09. His opinion was based on Herrick's predicate offenses, the 2009 PPG testing, which he said demonstrated that Herrick had a preference for coercive sexuality, and actuarial testing. Dr. Judd opined that Herrick's results on these tests predicted a high risk of recidivism.

Dr. Judd completed an updated clinical evaluation using 2,000 pages of Herrick's previous records. He had a meeting with Herrick but Herrick declined to participate in a clinical interview. In April 2012, Dr. Judd provided an addendum and again opined that Herrick met the definition of a sexually violent predator. Dr. Judd used the Structured Risk Assessment, the Static 99 and the SORAG. He also relied on the results of Herrick's 2009 PPG, which he characterized as demonstrating a clear arousal to humiliation rape of an adult female and rape of a female minor, despite apparent attempts to suppress arousal. CP 675-683.

In May 2012, defense expert, Stephen Jensen, M.A., criticized Dr. Judd's report as it related to the 2009 PPG. Mr. Jensen opined that he

concluded with the Northwest Treatment Associates evaluator who found the PPG inconclusive:

The [PPG] assessment was conducted appropriately and followed ... standards. The conclusions by the evaluators appear to accurately reflect the assessment data. The data was correctly assessed as "inconclusive," which indicated it is not clinically predictive. Dr. Judd incorrectly concluded that this data reflected a preference for aberrant sexual behavior, while in reality no preference was clear to any form of sexual behavior.

CP 688-694.

Herrick deposed Dr. Judd on November 28, 2012. In that deposition he stated:

Now with regard to the PPG, that is utilized, from my standpoint for identification of range of deviancy, In some cases it is also utilized for confirmation of a diagnostic formulation, and also looking at the -- ensuring that I have an understanding of the full range of deviancy and that I can actual target the treatment to those specific areas where the individual is having difficulty.

CP 458.<sup>1</sup>

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<sup>1</sup>There is some disagreement about whether the PPG test should be used as an assessment tool. In *Kirk v. State*, 520 S.W.3d 443 (Mo. 2017), the sex offender sought to admit expert testimony regarding results of the offender's favorable PPG results at civil commitment proceeding. However, the State's two expert witnesses testified that test was a good tool for treatment, but that any other use would be questionable, that test had not been standardized or cross-validated, and that majority of professionals would agree that test should only be used for treatment. Thus, the appellate court affirmed the trial court's order excluding the favorable PPG results. Similarly, the Fourth Circuit has held, "[T]he scientific literature addressing penile plethysmography does not regard the test as a valid diagnostic tool, because although useful for treatment of sex offenders, it has no accepted standards in the scientific community." *United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995), cert. denied, 516 U.S. 1077, 116 S.Ct. 784, 133 L.Ed.2d 734 (1996). In

On December 10, 2012, about 90 days before trial, the State moved for an order requiring Herrick to submit to a second PPG pursuant to RCW 71.09.050(1). CP 684-86. In support of this motion the State submitted a declaration from Dr. Judd signed the day after his deposition.

He said:

In order to provide the most current information possible, I am requesting another PPG of Mr. Herrick and a follow-up clinical interview.

*Id.* No other justification was given.

Herrick objected to the second PPG. He also provided an expert declaration from Dr. Joseph Plaud, a certified sex offender treatment provider. Dr. Plaud stated that he used PPGs in his practice and had conducted evaluations in Washington at the Special Commitment Center.

He stated that in his professional opinion:

The PPG is not like other forms of psychological assessment. It is an extremely invasive procedure which must be conducted by competently trained evaluators in a safe and secure environment, and with the full and free consent of the individual being assessed. The validity of the PPG is largely dependent upon these factors being present. The process of obtaining consent through the coercion of a court-ordered PPG evaluation would violate these principles and therefore under most circumstances would be considered both unethical (from a psychological

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*United States v. McLaurin*, 731 F.3d 258, 262 (2d Cir. 2013), the Court said: “the Government has made no showing that this exceedingly intrusive procedure has any therapeutic benefit, and none is apparent to us.”

professional standpoint) and invalid (from a procedural standpoint). In my professional experience over the past approximately 25 years of conducting PPG evaluations, I have never encountered a situation at the pre-commitment stage involving any client (whether in clinical or forensic professional contexts) in which PPG results were created from the coercion of a court order.

CP 504-507.

On January 22, 2013, the trial court granted the State's motion to compel PPG testing. In his oral ruling the judge said he understood that Dr. Judd relied on the prior PPG to formulate his position that Herrick should be committed, but that it was "understandable" that he would want an "updated" PPG. 1/22/13 RP 27. He also stated that "the statute provides for it." In sum, the judge said:

I do find there is good cause to order the testing in the present case given the prior plethysmograph, which was before this case was filed. The statute allows for the Court to order such testing. Dr. Judd has indicated in his declaration that he requests that this testing be undertaken as part of the formulation of his analysis here. So I find that there is good cause.

*Id.* The trial court did not place any limits on the subject matter or duration of the testing.

### III. ARGUMENT

#### A. RCW 71.09.050(1) IS UNCONSTITUTIONAL ON ITS FACE

Herrick hereby incorporates his briefing from the Court of Appeals in cause numbers 69993-8-I and 69018-4.

In the Court of Appeals Herrick argued that RCW 71.09.050(1) is either unconstitutional on its face or unconstitutional as applied to him because it violated his Fourteenth Amendment and Const. Art. 1, § 7 rights to due process and privacy. He argued that the state and federal constitutions required heightened scrutiny of any order for the application of an intrusive bodily procedure and that the statute did not contain a requirement of heightened scrutiny. Herrick also argued that as applied to him the statute was unconstitutional. The Court of Appeals rejected both arguments and affirmed.

The Court of Appeals looked at the statute and seemed to hold that the statute requires a heightened level of scrutiny before the trial court can order a PPG. But that is not entirely clear from the published decision. Slip Opinion at 6. The appellate court's reasoning is confusing and contrary to law. This Court should hold that any statute that permits PPG testing requires that the party seeking such testing meet heightened standards of scrutiny to establish that such a request is reasonable, and that the PPG is the least intrusive test available.

First, the Court of Appeals failed to reference settled principles of statutory construction. To evaluate a statute's constitutionality, a court's task is to look at its plain wording. *In re Detention of Campbell*, 139 Wn.2d 341, 348, 986 P.2d 771, 775 (1999), *as corrected* (Dec. 14, 1999), *cert. denied*, 531 U.S. 1125, 121 S.Ct. 880, 148 L.Ed.2d 789 (2001). Here, the Court of Appeals appears to have ignored the fact that there is no guidance on the level of scrutiny a trial court must engage in before granting a request by the State for PPG testing of a pretrial detainee.

In seeking to get around the lack of heightened scrutiny in the statute, the Court of Appeals held that the statute did not give the trial court unfettered discretion to order a PPG. The Court reasoned that it can be ordered "only in the context of determining whether a person named in the SVP petition is an SVP." Slip Opinion at 6-7. This "reasoning" makes no sense at all. That is simply a description of the context in which the State might ask for a PPG. It is not a "limitation."

Second, the Court reasoned that the statute is constitutional because the State must ask a judge for an order for testing. Slip Opinion at 6. The Court says that because the State has to ask the trial court for an order, the decision is not "unfettered." But again, that is not Herrick's complaint. His argument is that *the statute* does not incorporate constitutional limitations on the judge's power to grant the State's request.

The statute itself does not provide any guidance as to how the trial court's discretion is limited by the nature of the test and constitutional principles.

That led the Court to its third mistake – dismissing Herrick's reliance on *United States v. Weber*, 451 F.3d 5521 (9<sup>th</sup> Cir. 2006), and failing to make any mention of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Herrick relied on *Weber* to establish that PPG's involve a significant bodily intrusion. The State did not dispute that conclusion. Herrick's position is that statutes that permit bodily intrusions are subject to heightened constitutional standards. But the Court of Appeals failed to discuss that claim.<sup>2</sup>

The seminal case regarding the constitutionality of bodily intrusions is *Schmerber v. California*, supra. In *Schmerber*, the defendant challenged his conviction for driving while intoxicated on the ground that the warrantless "seizure" of his blood over his objection violated his rights

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<sup>2</sup> Other courts agree with *Weber*: "The procedure inflicts the obviously substantial humiliation of having the size and rigidity of one's penis measured and monitored by the government under the threat of reincarceration for a failure to fully cooperate. And even if the machine could accurately monitor and record the extent or intensity of a convict's prurient interests (a proposition about which we have serious doubts), the goal of correctional treatment during supervised release is properly directed at conduct, not at daydreaming." *McLaurin*, 731 F.3d at 263. And, in *United States v. Medina*, 779 F.3d 55, 71 (1st Cir. 2015), the Court held "the disputes regarding the procedure's reliability reinforce the concern raised by its distinctive invasiveness and unusual physical intrusion into an individual's most intimate realm."

under the Fourth Amendment. The *Schmerber* Court rejected the defendant's claim that the seizure of blood was an unreasonable search and seizure. The court identified three requirements deemed critical to the reasonableness of the bodily intrusion in question. First, there must be a "clear indication" that in fact the desired evidence will be found. Second, the test chosen to measure the defendant's blood alcohol level must be a reasonable one. Third, the test must be performed in a reasonable manner. *Schmerber*, 384 U.S. at 770-71.

In *Rochin*, the police entered the defendant's bedroom and saw him put two capsules into his mouth. Three officers "jumped upon him" and unsuccessfully tried to extract the capsules. The defendant was taken to a hospital and forced to ingest an emetic solution through a tube. *Rochin* then vomited up the capsules containing morphine. The Supreme Court characterized the officers' conduct as "brutal" and shocking to its conscience, and held that their method of retrieving the evidence was "too close to the rack and the screw" not to have violated due process of law. *Rochin*, 342 U.S. at 172-74.

Based upon *Schmerber* and *Rochin*, the Ninth Circuit reached the conclusion that convicted sex offenders retain a significant liberty interest in being free from plethysmograph testing. *Weber* explained that the defendant enjoyed "heightened procedural protections" before a district

court could mandate submission to PPG testing if a sex offender treatment program used the procedure. *Id.* at 570. These protections required that the district court undertake a “consideration of evidence that plethysmograph testing is reasonably necessary for the particular defendant based upon his specific psychological profile.” *Id.* at 569-70. *Weber* further explained that, under the governing statute, a district court needed to consider available alternatives to PPG testing, such as self-reporting interviews, polygraph testing, and “Abel testing,” which measures the time a defendant looks at particular photographs. *Id.* at 567-68.

It is unclear why the Court of Appeals ignored *Schmerber* and *Rochin*. Certainly a blood test is far less intrusive than PPG testing. And, while it may be a closer question as to whether it is more or less intrusive than the intrusion in *Rochin*, having your brain and genitals manipulated by a machine and visual images so that the expert can judge one’s thoughts is humiliating.

The Court of Appeals also suggested that, despite the bodily intrusions inherent in PPG testing, there were “heightened” standards in the statute because a PPG can only be administered at the request of an expert. But the fact that an evaluator requests the test does nothing to limit the intrusions. Most procedures involving bodily intrusion and manipulation are conducted by experts.

This Court should hold that the statute is unconstitutional on its face. In the alternative this Court should hold that before a trial court may order a PPG test pursuant to RCW 71.09.050, the must find that the 1) the PPG is reasonably necessary for the defendant based upon his particular psychological profile, 2) the PPG would be administered in a reasonable way and 3) no alternative, less intrusive testing is available.

**B. RCW 71.09.050(1) IS UNCONSTITUTIONAL AS APPLIED TO HERRICK**

Finally, in this case, even if this Court were to read those constitutional limitations into the statute, it would be compelled to find that the trial court's order in this case did not reflect a heightened level of scrutiny. There was no evidence that a new PPG was reasonably necessary or would produce reliable results and the trial court did not consider any alternatives to this invasive type of testing. The State's expert has already opined that Herrick meets the definition of SVP. Thus, there is no basis for a second, compelled PPG test.<sup>3</sup>

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<sup>3</sup>There is considerable dispute about whether a compelled test would yield any reliable results.

C. THE CONTEMPT ORDER SHOULD BE REVERSED AS WELL

The trial court held Herrick in contempt because he refused to comply with the order compelling PPG testing. It appears that the only sanction still at issue is the trial court's finding that Herrick's refusal to participate in a second, compelled PPG test is admissible at trial. If this court reverses the order compelling the testing, any evidence about Herrick's initial refusal and his exercise of his right to appeal would be irrelevant and inadmissible.

IV.  
CONCLUSION

This Court should reverse the Court of Appeals' opinions in this matter.

DATED this 17th day of November, 2017.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

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